CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF AND MOTION TO SUPPLEMENT COMPLAINT.

GEORGE W. DALZELL,
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DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

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OGDEN H. HAMMOND, JR.,

vs. *Petitioner,*

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ogden H. Hammond, Jr., respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This case involves important and novel questions of law concerning (1) the rights and responsibilities of lifetime career Foreign Service Officers of the United States, and

(2) proper methods of administrative hearing and procedure, with particular reference to the Foreign Service of the United States. These questions all arise on the dismissal of petitioner's complaint, and hence no question of fact is here involved.

Petitioner filed his complaint in the District Court of the United States for the District of Columbia on March 18, 1941 seeking mandatory, injunctive and declaratory relief against respondents on the following facts set forth under his oath in the complaint:

(1) Petitioner is a Foreign Service Officer of the United States, appointed by President Roosevelt and confirmed by the Senate, who took oath of office on March 22, 1939 (R. 3).

(2) Petitioner served as Vice-Consul in Vienna from April 3 to October 31, 1939, as Vice-Consul in Leipzig from November 1, 1939 to February 21, 1940, then in the Foreign Service Officers' Training School at the Department of State in Washington, D. C., from which he graduated in June, 1940, and then in the Division of Cultural Relations in the Department of State, Washington, D. C., until December 27, 1940 (R. 3). From December 27, 1940 until the filing of this complaint (March 18, 1941) petitioner was on leave of absence with pay (R. 3).

(3) On August 1, 1940 petitioner was duly promoted in grade in the Foreign Service and received a salary increase (R. 3). He received praise for his work at all times from his superiors, including respondents Berle and Shaw, until October 18, 1940 (R. 4).

(4) Petitioner was summoned to respondent Berle's office on October 18, 1940 and his resignation from the Foreign Service summarily demanded on the ground of two stories about him, (1) that he had publicly mimicked the President of the United States with particular emphasis upon the

President's physical affliction, and (2) that he had had disloyal dealings with a female agent of a foreign government (R. 4, 34-35). Despite petitioner's demands for details, names, and places none were given him but respondent Berle promised that he would investigate these matters in full and give petitioner details within two days (R. 4, 35).

(5) Nevertheless respondent Berle did not call petitioner again until October 31, 1940 when respondent Berle said "that he now knew the mimicry story was true because it had been witnessed by Cornelius Vanderbilt, Jr., and by his sister, Grace Vanderbilt Stevens (Mrs. Robert L. Stevens)" (R. 5), and that these two "had informed J. Edgar Hoover personally of the veracity of this story" (R. 5, 35-37). As to the female foreign agent, respondent Berle told petitioner that he was asking about petitioner's relations with one Lilly Stein in Vienna (R. 5, 36).

(6) These two stories concerning petitioner are vicious and false in every particular, as petitioner has solemnly sworn (R. 5, 6, 40). With the aid of friends, petitioner accumulated sworn evidence of the absolute falsity of the two stories, including sworn denials by Grace Vanderbilt Stevens (R. 43), Lilly Stein (R. 41-43), and Adelaide Whitehouse (R. 44), at whose home the mimicry was supposed to have occurred. At the same time petitioner told the full story as he knew it under oath (R. 30-41), and submitted the whole matter to respondent Shaw, the then Chief of Foreign Service Personnel, in a letter of November 14, 1940 (R. 29). This letter and its enclosures were no reply to charges as none had ever formally been made (R. 40-41, 54).

(7) In the meantime respondent Berle, despite his personal promises to the contrary (R. 5, 39, 46-51), formally preferred these two charges against petitioner to the Board of Foreign Service Personnel on November 6, 1940 (R. 5),

after having beguiled petitioner with maliciously false statements concerning his affection for petitioner and petitioner's family (R. 4, 37, 45).

(8) After November 14, 1940 all steps against petitioner were temporarily dropped (R. 6), and not until his reporting to respondent Shaw for active duty on February 17, 1941 after his leave of absence, did petitioner hear anything further (R. 7). At that time respondent Shaw forced petitioner to continue on leave and told him that unless his resignation was immediately forthcoming he would be tried in a Star Chamber proceeding on camouflaged charges of "temperamental unfitness" and "irresponsibility" (R. 7). Petitioner declined to resign (R. 7, 53) and demanded an investigation of the stories to reveal their falsity and unmask their perpetrators (R. 53, 37).

(9) Thereafter respondent Shaw in succession told petitioner a series of fantastic tales, all endeavoring to force him into resignation (R. 8-10, 19-20). Petitioner refused and in writing sought information from respondent Shaw as to the proper legal procedure to be followed, as well as continuing his efforts to secure an investigation of the two stories about him (R. 53-59, 61-64).

(10) The illegalities of the procedure followed and proposed to be followed in petitioner's case are fully set forth in the complaint (R. 9-18). (Parenthetically it may be noted that paragraphs 17 and 18 of the complaint (R. 14-18) are modelled exactly on paragraph IV of the complaint held by this Court in *Morgan* v. *United States,* 298 U. S. 468 and 304 U. S. 1, to state a good cause of action. The reason for using that as a model was that respondents' procedure and proposed procedure violated in each particular the rules announced in the *Morgan* case.)

(11) On March 14, 1941 petitioner was handed two letters (Exhibits G and H; R. 64-66) dated March 7, 1941 and

signed by respondent Shaw, by respondent Erhardt (R. 19-20), which rated petitioner as "unsatisfactory" and assigned him to Montreal, Canada as Vice-Consul for a period of probation. Previously petitioner had been informed of this by respondent Shaw who further informed him that the whole device was a scheme to throw him out of the Foreign Service (R. 8, 9-10) regardless of his merits.

(12) Respondents other than Berle and Shaw (*these two at all material times forming a controlling majority of two out of the three members of the Board of Foreign Service Personnel; R. 18, 24* [1]) are only necessary nominal defendants (R. 22). Respondents Berle and Shaw are actuated solely by personal malice and spite toward petitioner (R. 6, 9, 12, 16, 18, and 22), and have acted fraudulently, arbitrarily and capriciously against him (R. 6, 9, 11, 16, 18, and 22) in particulars detailed in the complaint and in other manners which will be shown at trial if this complaint is reinstated by this Court.[2] Respondent Shaw on the eve of filing the complaint herein sought by threats to deter petitioner from resort to the courts (R. 21).

(13) Petitioner's rating of "unsatisfactory" was never confirmed by the Secretary of State as specifically required by Section 23i of Title 22, U. S. C. (R. 12, lines 13-18; R. 13, lines 2-14; R. 18, sub-paragraph 9). Neither the President nor the Secretary of State have ever taken any action against petitioner, but on the contrary each has declined to do so.

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[1] Emphasis ours throughout unless otherwise noted.

[2] E. g., attempted intimidation of petitioner's witnesses, misdirection of petitioner's mail to his detriment, illegal removal of petitioner from payroll, and blocking petitioner in private employment and gainful financial enterprises (this latter by Berle). For an outside view of respondent Berle, see *New Yorker Magazine,* January 16, 1943, p. 22 *et seq.,* January 23, 1943, p. 20 *et seq.*

(14) On March 18, 1941 petitioner filed his complaint seeking judicial relief (1) to compel administrative procedure in accordance with law, and (2) to direct respondents to accord him his statutory rights (R. 24-27). The complaint is verified (R. 28) *and is undenied.* If trial is ordered by this Court petitioner stands ready to prove his complaint by many reputable and responsible witnesses, as well as by documentary evidence.

(15) A motion for temporary injunction was filed with the complaint (R. 72). On March 24, 1941, respondents moved to strike and dismiss the complaint (R. 73) which motion necessarily admitted all allegations of the complaint. An oral hearing was held before Mr. Justice O'Donoghue in the District Court on March 25, 1941, at which affidavits by respondents Berle, Long, Acheson, Shaw and Erhardt were submitted in opposition *only to the motion for temporary injunction* (R. 74-87). (Parenthetically it is to be noted that these affidavits which go only to the motion for temporary injunction *not made here* and of only academic import since April 17, 1941 as explained hereinafter, are included in this record over petitioner's protest (R. 129-131). Unless these were included, the Solicitor General refused to sign the stipulation permitting the filing of this record (R. 132). This makes a unique record in the case of a dismissed complaint before this Court, and if certiorari is granted we shall move to reframe the record.) [3] On

[3] These affidavits nowhere deny the fraud, malice, intent or actions of respondents Berle and Shaw, and present only three additional points: (1) An alleged verbal warning by Shaw to petitioner on November 8, 1940; (2) An alleged "informal understanding" between respondent Long and petitioner's father on November 16, 1940 as to the possibility of petitioner's resignation from the Foreign Service; and (3) The alleged "formal" action of the Board on March 5, 1941 rating petitioner as "unsatisfactory" and the alleged confirmation thereof by the Secretary of State *on March 7, 1941.* The first two of these points are completely shattered by affidavits of petitioner dated April 4 and 10, 1941, and of

March 29, 1941, Mr. Justice O'Donoghue filed his opinion (never reported) dismissing the complaint upon the ground it was premature and denying the temporary injunction (R. 88-89). Findings of fact and conclusions of law (R. 91-92) were filed on the motion for temporary injunction only and petitioner's proposed finding or conclusion denied (R. 90) on March 31, 1941. On that day final judgment was entered dismissing the complaint (R. 93).

(16) On April 1, 1941, petitioner filed his appeal to the Court of Appeals (R. 94). In the Court of Appeals various motions, including motions to advance, to supplement the complaint, to remand for rehearing upon the supplemental complaint, and for temporary injunction were made and denied prior to argument on March 9, 1942. In all it took more than eighteen months for this case to proceed through

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his father dated April 1, 1941, duly submitted to the Court of Appeals on the motion for temporary injunction in that court, denied April 16, 1941. (It is to be noted that the renewal of this motion for temporary injunction in the Court of Appeals was the only reason for the original inclusion of respondents' affidavits in the record. It is obviously highly improper to have them in this record when no such motion for temporary injunctive relief is made here, and it is ludicrous to ask this Court to pass on the truth or falsity of the material therein contained in view of the exclusion from the record of all petitioner's contradictory material.)

The third point as to the alleged confirmation by the Secretary of State is a critical point at issue here, for if respondents desired to avoid hearing upon this point they should be compelled to resort to the appropriate procedure by summary judgment (Rule 56 of the Rules of Civil Procedure) or otherwise, *and should not be permitted to introduce their own proof and exclude petitioner's proof. Petitioner has proof available to show the falsity of the alleged confirmation by the Secretary of State.* It is to be noted that this asservation appears only in the affidavits of respondents Berle, Shaw and Acheson, but is omitted from that of respondents Long and Erhardt. Likewise, the most significant fact of all is not only the omission of any affidavit or statement of similar import from the Secretary of State but the inclusion of a letter from him to petitioner stating *on March 10, 1941*—or in other words, three days after the alleged confirmation of the probationary order—that he still had the matter under consideration (R. 69). It is apparent that the internal dealings of the Department in this matter, in view of this confused state of the record, should be inquired into upon formal hearing.

the Court of Appeals to final judgment, that is from April 1, 1941 to October 12, 1942 (R. 97, 104-105). The opinion of the Court of Appeals by Mr. Justice MILLER affirming the judgment of dismissal (R. 97-103) is reported in 131 F. (2d) 23. The general theory of the opinion is also one of prematurity of complaint. Petitioner filed a full petition for rehearing which points out the errors and omissions of the opinion (R. 104-120). Petitioner also sought to secure a decision from the Court of Appeals upon his undecided motion to supplement his complaint and moved accordingly (R. 121-123, 126-128). After consideration both these motions were denied without opinion by the Court of Appeals on November 7, 1942 (R. 128-129). This application for certiorari follows and is timely. The sole question upon the application is whether the complaint states a good cause of action.

(17) In the long interval consumed in the Court of Appeals much was done to harm petitioner by respondents Berle and Shaw. Within two hours after the denial of his motion for temporary injunction in the Court of Appeals on April 16, 1941, his name was stricken from the payroll by respondent Shaw. See R. 123 and motion to supplement the complaint attached hereto which relates the facts that have happened to date. (By reason of the prior decisions of this Court cited in that motion, we believe this material is properly brought to the attention of this Court.) Petitioner has no desire whatever to impede the Administration or the Department of State in these crucial times but only to secure that elementary personal justice for which we are all now fighting (R. 61), and in conformity with his beliefs in this matter, enlisted as a private in the Army of the United States on December 15, 1942 with the full permission of the Department of State. If certiorari is granted herein and the complaint reinstated for trial by this Court, it is peti-

tioner's intention to secure the adjournment of the hearing until after the war, under the Soldiers' and Sailors' Civil Relief Act of 1940 as amended in order not to embarrass the Department of State.

II.

Jurisdiction.

Petitioner's timely-filed petition for rehearing was denied by the Court of Appeals on November 7, 1942 (R. 129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Questions Presented.

On the facts of this case as stated in the complaint (R. 1-71), the following questions are presented:

1. Is the procedure followed by respondents in petitioner's case the proper and lawful statutory procedure commanded by Sections 23h and 23i of Title 22 of the United States Code?

2. Does the failure of the Secretary of State to confirm the efficiency rating of a Foreign Service Officer as "unsatisfactory", as required by Section 23i of Title 22 of the United States Code, render it unlawful to place such Foreign Service Officer on an unsatisfactory status and to notify him officially thereof?

3. Does the existence of actual malice in an administrative official, with his official actions exclusively guided by such malice, subject such official to judicial interference in either his public or his private capacity?

4. In view of the fact that petitioner charges on oath and with particularity that he will be granted no fair or lawful administrative hearing, and that his evidence will not be taken or heard, is the present complaint premature?

5. Does the complaint herein state a good cause of action against the respondents or any of them?

6. Should the complaint herein be supplemented as requested by motion hereto attached?

IV.

Statutes Involved.

The statutes and regulations involved herein concerning the Foreign Service of the United States are collected in Title 22 of the United States Code, and in Title 22 of the "Code of Federal Regulations of the United States of America." Because of the length of the applicable statutes and regulations, they are set forth as the Appendix to the brief in support of this petition.

V.

Reasons for Granting the Writ.

1. The question of the status, rights, duties and responsibilities of career Foreign Service Officers of the United States is a generally important one which has not been but should be settled by this Court. Likewise the facts of the instant case present questions of substance relating to the proper construction of Sections 23h and 23i of Title 22, U. S. C. which have not been but should be settled by this Court. The small size of the lifetime career Foreign Service of the United States (about 800 members) and the importance of the work with which they are entrusted, namely

that of carrying on the diplomatic relations of the United States, make it important that their rights should be definitely settled by final decision of this Court. This is particularly true in view of the fact that the Congress of the United States, after consolidation of the consular and diplomatic services into the Foreign Service, later had occasion (1927) in a thorough Senate investigation of the Department of State, to find fraud and favoritism rampant there (Senate Report 1069 of the 70th Congress, 1st Session). The Congress then proceeded (1931) to write new safeguards into the Foreign Service statutes, namely Sections 23h and 23i of Title 22, U. S. C. in question here (House Report 2702, 71st Congress, 3rd Session). The proper interpretation of these statutes has been and is now a matter of debate in the Department of State and a matter of great personal concern to each Foreign Service Officer. See R. 108-110 for a more complete delineation of the statutory problems here involved.

It is a matter of common knowledge that the instant case since its inception has been and is of great public interest. There is also presented a generally important question which has not been but should be settled by this Court as to whether verified and detailed allegations that a plaintiff will be denied a fair administrative hearing entitles him to a judicial hearing *to determine the proper procedure to be followed in the administrative hearing to be held.* See *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56, 59-60; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41, 47; *Shields* v. *Utah R. R. Co.,* 305 U. S. 177; *Truax* v. *Raich,* 239 U. S. 33, 36-39.

2. The United States Court of Appeals for the District of Columbia in its decision herein has not given proper effect to the applicable decisions of this Court which (1) lay down the rules requiring administrative officials to follow statu-

tory procedure outlined by Congress, and (2) establish the rule that personal malice influencing or determining official action is ground for proceeding against a public official in his public capacity. The decisions of this Court which were not given the proper effect by the Court of Appeals are: (1) *Morgan* v. *United States*, 304 U. S. 1; *Runkle* v. *United States*, 122 U. S. 543; *United States* v. *Redgrave*, 116 U. S. 474; *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Wickersham*, 201 U. S. 390, all with reference to following the statutory procedure outlined by Congress, and (2) *Wilkes* v. *Dinsman*, 7 How. 89 and *Dinsman* v. *Wilkes*, 12 How. 390, with reference to the proper rule on malice. In fact the Court of Appeals found it convenient to dispose of the instant case without reference to any of these decisions of this Court pressed upon it as controlling. This is dubious jurisprudence. See *Honeyman* v. *Hanan*, 300 U. S. 14.

3. The personal injustice and the extraordinary errors committed by the lower courts in their method of interpreting the complaint and the record herein should impel this Court to exercise its supervisory power to maintain a uniform federal judicial system. Admittedly if any complaint by one Federal official against others can state a valid cause of action, this complaint does so. If the rule is to be established in the United States that no subordinate Federal official can have any recourse to the courts against his superiors even though statutes of Congress have been and are being plainly violated, then that rule of law should be directly established by judicial decision, rather than that the law of procedure for interpreting a complaint, and the rules established by this Court as the Rules of Civil Procedure for the conduct of the lower courts of the United States, should be mangled and distorted in order to reach a result believed to be desirable. See our petition for rehear-

ing in the Court of Appeals (R. 104-120), which we believe fully limns the singular deficiencies in the opinion of that court.[4]

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings had in said United States Court of Appeals for the District of Columbia in the case therein entitled "Ogden H. Hammond, Jr., Appellant, *v.* Cordell Hull, Adolph A. Berle, Jr., Breckinridge Long, *et al.*, Appellees, No. 7871", to the end that said case may be reviewed and determined by this Court, as provided by law, that the judgment of said court be reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem just and proper.

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[4] Record references in the rehearing petition are denoted as "Appellant's App. p. —," but the page references are identical with those of the record here.